

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Promoting the Availability of Diverse and ) MB Docket No. 16-41  
Independent Sources of Video Programming )

**COMMENTS OF  
ASPIRE CHANNEL, LLC AND UP ENTERTAINMENT, LLC**

Aspire Channel, LLC (“Aspire”) and UP Entertainment, LLC (“UP”) submit these comments in response to the Notice of Proposed Rulemaking in this proceeding.<sup>1</sup> Based upon the extensive record in the FCC’s Notice of Inquiry,<sup>2</sup> the FCC found that many large multichannel video programming distributors (“MVPDs”) required unconditional most favored nation (“MFN”) and unreasonable alternative distribution method (“ADM”) provisions in their carriage agreements with independent programmers and that such provisions are likely to harm programming diversity, without any public interest benefits. The experiences of Aspire and UP in the marketplace are consistent with these FCC findings, and there is ample authority for the FCC to adopt rules prohibiting unconditional MFN and unreasonable ADM provisions.

Aspire and UP are independent programmers. They are not affiliated with any MVPD or broadcaster and are not part of a media conglomerate with leverage from retransmission consent. Each targets underserved American viewers and provides the very kind of diversity that the Commission has sought not simply to preserve but to promote:

The “ASPiRE” channel was launched in June 2012 and is dedicated to enlightening, entertaining, and promoting positive programming for African-American families. ASPiRE celebrates African-American achievement, and

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<sup>1</sup> See *Promoting the Availability of Diverse and Independent Sources of Video Programming, Notice of Proposed Rulemaking*, 31 FCC Rcd. 11352 (2016) (“NPRM”).

<sup>2</sup> See *Promoting the Availability of Diverse and Independent Sources of Video Programming, Notice of Inquiry*, 31 FCC Rcd. 1610 (2016) (“NOI”).

offers a diverse mix of programming, including movies, series and specials featuring music, comedy, drama, faith/inspiration, theatre/performing arts, lifestyle and news/information. ASPIRE seeks to convey inspirational images, authentic stories, and achievable lifestyles to African-American viewers.<sup>3</sup>

“UP” provides uplifting and entertaining programming suitable for viewing by the entire family. Viewers identify it as a channel that they can trust to “watch with my family.”<sup>4</sup> UP programming includes original movies, series, and specials, as well as licensed family-friendly dramas and series. It seeks to present stories of faith, hope, and redemption with positive underlying messages.

Examples of the programming diversity offered by ASPIRE and UP are provided in the annexed Exhibits A and B. At a time when an increasing number of shows appearing in prime time are rated as inappropriate for viewing by the entire family because of suggestive dialogue, coarse or crude language, sexual situations or violence,<sup>5</sup> the programming diversity offered by Aspire and UP is obvious.

**A. Large MVPDs Continue to Require Restrictive MFN and ADM Provisions in Carriage Agreements**

In their comments submitted in the NOI proceeding, Aspire and UP confirmed that: (1) large MVPDs typically insist upon restrictive MFN and ADM provisions; (2) the combined effect of such MFN and ADM provisions can limit or preclude the distribution of independent programming to alternative media such as OTT distributors; and (3) a programmer burdened with these MFN and ADM provisions risks losing the carriage commitments of large MVPDs if it agrees to carriage on new and emerging platforms. *See Aspire and UP Comments*, MB Docket No. 16-41, filed Mar. 30, 2016, at 4-5. The one-size-fits-all demands of some MVPDs stifle the

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<sup>3</sup> Aspire is a certified minority business by the National Minority Supplier Diversity Council (“NMSDC”) through the Georgia Minority Supplier Diversity Council (“GMSDC”).

<sup>4</sup> UP Family TV Segmentation and Ad Transference Studies 2014: N=5000 and 1000; Internet Survey of P18-54 in CablePlus Homes.

<sup>5</sup> Based upon a review of programs rated “TV14 DSLV” or “TVMA” in TV Guide for January 2015, approximately one-half of all shows appearing in prime time were rated as inappropriate for family viewing because of suggestive dialogue, course or crude language, sexual situations or violence.

very innovation and investment that, but for these provisions, independent programmers are well positioned to undertake to meet the individualized and unique business needs of each of their MVPD customers and markets.

The FCC's review of the "thousands of comments from a broad range of interested parties" (NPRM at ¶5) submitted in response to the NOI demonstrates the "harmful effects" of restrictive MFN and ADM provisions on small and independent programmers, alternative distribution platforms, and consumers:

The record from the NOI reveals that MVPDs have increasingly insisted that video programmers, particularly those that are small and independent, accept restrictive MFN and ADM provisions in order to secure carriage of their programming. The record also suggests that these types of provisions cause a variety of harmful effects. Consumers ultimately feel these negative effects most acutely. Because restrictive contract provisions limit the incentives and ability of independent programmers to experiment with innovative carriage terms and to license their content on alternative, innovative platforms, they deprive consumers of the benefits that otherwise would flow from enhanced competition in the video programming and distribution marketplace. These benefits would include expanded choice in the sources and variety of video programming, technological innovation, greater flexibility in the means and manner of accessing program content, and lower prices for video programming services.

See NPRM at ¶2. The FCC's findings in the NOI proceeding confirm the reliability of Aspire's and UP's industry experience.

The specific harmful effects of these provisions upon independent programmers, programming diversity and the public are well-documented in the NOI record. Unconditional MFN provisions: (1) "appear designed to discourage or foreclose the wider distribution of video content, including on online platforms;" and (2) "effectively limit the flexibility of content providers to enter into unique deals with new and emerging distributors, thereby impeding entry into program production and distribution marketplaces and reducing consumer choice." NPRM

at ¶¶19-20. Restrictive ADM provisions also “have an adverse impact on the provision of diverse programming sources to consumers.” *Id.* at ¶23.

No party in the NOI proceeding identified any “public interest benefits that accrue” from making MFN provisions unconditional or any “discernibly pro-competitive justifications” for certain restrictive ADM provisions. *See* NPRM at ¶¶20, 23. The proposed MFN and ADM rules “are targeted only at contract clauses that harm competition, diversity and innovation while providing no apparent public interest benefits.” *Id.* at ¶15 n.67. Aspire and UP, therefore, support the FCC’s proposed rules prohibiting the unconditional MFN and unreasonable ADM provisions required by MVPDs.

**B. The FCC Long Has Recognized that Programming Diversity Is in the Public Interest.**

The FCC consistently has recognized that programming diversity is a “core public interest value.” *See, e.g., Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign or Transfer of Control of Licenses and Authorizations*, 26 FCC Rcd 4238 (2011) at ¶27. The “broad aims of the Communications Act” include “a deeply rooted preference for preserving and enhancing competition, accelerating private sector deployment of advanced services, [and] *promoting a diversity of information sources and services to the public.*” *Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer of Control of Licenses and Authorizations*, 30 FCC Rcd. 9131 (2015) at ¶19 (emphasis added).

Consistent with its recognition of diversity as a “core public interest value,” the FCC again acknowledged in the NOI that “[a] central objective of multichannel video programming regulation is to foster a diverse, robust, and competitive marketplace for the delivery of multichannel video programming,” and that the FCC is “the agency charged by statute with



implementing this objective.” *See* NOI at ¶2. Several of the Act’s provisions applicable to MVPDs and video programming expressly acknowledge the promotion of a diverse programming market as a “purpose.”<sup>6</sup>

Further, the “Statement of Policy” in the Cable Television Consumer Protection and Competition Act of 1992 declared that it was “the policy of Congress in this Act” to: (1) “promote the availability to the public of a diversity of views and information through cable television and other video distribution media;” (2) “ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems;” and (3) “ensure that cable television operators do not have undue market power vis-à-vis video programming programmers and consumers.” *See* Pub. L. 102-385, Sec. 2(b), 106 Stat. 1460, 1463. The Act plainly identifies a diverse programming market as a statutory goal, and the FCC will advance that goal by implementing its MFN and ADM proposals.

### **C. The FCC Has Statutory Authority to Adopt Rules Prohibiting Unconditional MFN and Unreasonable ADM Provisions**

Aspire and UP endorse the FCC’s view that Congress’s direction in Section 616(a) that the FCC “shall establish regulations governing carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors” (47 U.S.C. §536(a)) constitutes a general grant of rulemaking authority to prohibit unconditional MFN

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<sup>6</sup> *See* 47 U.S.C. §521(4) (“The purposes of this subchapter are to...(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public”); 47 U.S.C. §532(a) (“The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems”); 47 U.S.C. §533(f)(2) (“[T]he Commission shall, among other public interest objectives (A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer; (B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of video programming of such programmers to other video distributors...(G) not impose limitations which would impair the development of diverse and high quality video programming”).

provisions and unreasonable ADM clauses. *See* NPRM at ¶¶34-38. Several other provisions of the Communications Act of 1934, as amended (“Act”) also provide authority for the FCC’s proposed rules.

1. Section 616(a)

Although Section 616(a) states that the program carriage regulations “shall” contain provisions regarding financial interests, exclusive rights and discrimination, it does not limit the FCC’s regulatory authority regarding program carriage agreements to these three specific matters. Rather, Section 616(a) specifies only the minimum requirements for the regulations to be established by the FCC. The Second Report and Order adopted by the FCC in its 1992-93 program carriage rulemaking proceeding supports this interpretation. The FCC expressly recognized Section 616(a)’s broad intention to “prevent cable systems and other [MVPDs] from taking undue advantage of programming vendors *through various practices, including* coercing vendors to grant ownership interests or exclusive distribution rights to multichannel distributors in exchange for carriage on their systems.” *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, Second Report and Order*, 9 FCC Rcd. 2642 (1993) (emphasis added), at ¶1. Thus, when the FCC first adopted the program carriage regulations, it acknowledged that Section 616(a) authorized the FCC to address unspecified “various practices” through which MVPDs may disadvantage programming vendors, in addition to those listed in Section 616(a)(1)-(3).

The FCC again adopted an expansive view of the regulatory reach of Section 616(a) in its 2011 Notice of Proposed Rulemaking regarding the program carriage rules. *See Development of Competition and Diversity in Video Programming Distribution and Carriage; Notice of*

*Proposed Rulemaking in MB Docket No. 11-131*, 26 FCC Rcd. 11494 (2011). In the 2011 proceeding, the FCC sought comment on a proposal to adopt a “new rule prohibiting an MVPD from taking an adverse carriage action against a programming vendor because the programming vendor availed itself of the program carriage rules.” *Id.* at ¶64. Although Section 616 does not expressly prohibit MVPDs from retaliating against programming vendors for filing program carriage complaints, the FCC stated that Section 616 “does not preclude the Commission from adopting additional requirements beyond [those] listed in the statute” and that it “believe[d]” that it had “authority to adopt a rule prohibiting retaliatory carriage practices.” *Id.* at ¶65. Thus, the FCC’s interpretation that it has authority under Section 616(a) to address unconditional MFN and unreasonable ADM provisions accords with the FCC’s long-held view of the scope of Section 616(a). In short, nothing in Section 616(a) limits the provision’s broad grant of authority to adopt regulations “governing carriage agreements and related practices.”

## 2. Section 628

Based upon the FCC’s prior interpretation of Section 628 of the Act, it also is clear that its program access provisions “serve as a valid basis for establishing rules to address restrictive MFN and ADM provisions.” NPRM at ¶40.<sup>7</sup> In its First Report and Order adopting the program access regulations, the FCC plainly recognized that Section 628 affords the FCC “jurisdiction” to prohibit other practices that hamper the “broader distribution” of programming:

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<sup>7</sup> Section 628(b) of the Act prohibits a “cable operator [or] a satellite cable programming vendor in which a cable operator has an attributable interest” from engaging in “unfair methods of competition or unfair and deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.” *See* 47 U.S.C. §628(b). Section 628(c) requires the FCC to “prescribe regulations to specify particular conduct that is prohibited by” Section 628(b). *See* 47 U.S.C. §548(c). Section 628(c)(2), in turn, identifies specific prohibited “unfair practices,” such as the exercise of undue or improper influence, and discrimination in prices, terms or conditions of sale of satellite cable programming. However, like Section 616, the specifically-prohibited unfair practices merely set forth the “minimum contents” of the regulations to be adopted under the statute. 47 U.S.C. §548(c)(2).

Thus, although the types of conduct more specifically referenced in the statute, *i.e.*, exclusive contracting, undue influence among affiliates, and discriminatory sales practices, appear to be the primary areas of congressional concern, Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable...programming.

*See Implementation of Sections 12 and 19 of the Cable Television and Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order*, 8 FCC Rcd. 3359 (1993), at ¶41. Thus, Section 628 specifies certain “minimum contents of regulations,” but also authorizes the FCC to address more broadly other “unfair practices” engaged in by cable operators or vertically integrated programmers that have “the purpose or effect” of significantly hindering or preventing “any [MVPD] from providing satellite cable programming or satellite cable broadcast programming to subscribers or consumers.”

The United States Court of Appeals for the D.C. Circuit adopted this interpretation of Section 628 in *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011). In reviewing the FCC order extending the program access rules to terrestrially-delivered programming, the D.C. Circuit cited “[S]ection 628’s broad language and purpose” and determined that Section 628 established a “floor rather than a ceiling” in the FCC’s authority to adopt regulations prohibiting anti-competitive conduct regarding the provision of programming. *Id.* at 699, 705. *See also National Cable & Telecom. Ass’n v. FCC*, 567 F.3d 659, 665 (D.C. Cir. 2009) (D.C. Circuit upheld FCC regulation prohibiting exclusive cable operator/multiple dwelling unit contracts, noting that “Congress’s enumeration of specific, required regulations in subsection (c) actually suggests that Congress intended subsection (b)’s generic language to cover a broader field”).

Section 628 therefore provides a “clear repository of Commission jurisdiction” to adopt the proposed MFN and ADM rules.

3. Section 257

In addition to Sections 616 and 628, other provisions of the Act potentially provide authority for the FCC to prohibit unconditional MFN and restrictive ADM provisions. Section 257(a) of the Act required the FCC to “complete a proceeding” to identify and eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications and information services....” *See* 47 U.S.C. §257(a). Section 257(b), in turn, affirmatively requires the FCC to “promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity” in the course of its examination of such market entry barriers facing entrepreneurs and small businesses. *See* 47 U.S.C. §257(b).

Although the FCC currently views Section 257 as authorizing only the adoption of rules to eliminate these market entry barriers “if such rules are expressly authorized by provisions of the Act other than section 257” (*see* NPRM at ¶40 n.151), the FCC’s initial Section 257 Report to Congress suggested a broader approach. The FCC expressed its “strong commitment to continue to achieve [the] statutory goals” of diverse media voices, among others, and “outline[d] steps” the FCC “plan[ned] to take in the future” regarding these matters. *See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 12 FCC Red. 16802 (1997) (Section 257 Report) at ¶2.

The Section 257 Report regarding market entry barriers in the provision of “telecommunications and information services” included an examination of entry barriers in the

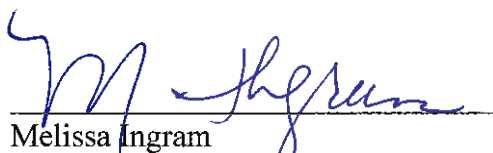
provision of “cable services” and the obstacles encountered by small cable operators in obtaining programming. *Id.* at ¶¶11, 153-57. Although the FCC declined to adopt regulations regarding small cable operator access to programming, it did not cite a lack of regulatory authority under Section 257. *Id.* at ¶157. Thus, the FCC’s historic interpretation of the scope of Section 257 suggests that the FCC has authority to adopt regulations addressing access to independent programming services.

### Conclusion


Both Aspire and UP uniquely focus on positive programming for and about families, and Aspire is the only minority-owned network serving African American family viewers. Clearly, each contributes to the programming diversity available for family viewing. The FCC already has found, based upon the extensive record before it, that unconditional MFN and unreasonable ADM provisions in MVPD carriage agreements with independent programmers harm both competition and programming diversity, while providing no public interest benefits. Aspire and UP therefore respectfully request the FCC to exercise its well-established statutory authority and adopt rules prohibiting unconditional MFN and unreasonable ADM provisions.

Respectfully submitted,

ASPIRE CHANNEL, LLC

  
Melissa Ingram  
Vice President and Channel Manager

UP ENTERTAINMENT, LLC

  
Charles Humbard  
President and Chief Executive Officer

January 26, 2017

## **Exhibit A**



aspire tv is the national cable network  
from NBA legend and entrepreneur  
**EARVIN "MAGIC" JOHNSON** that every  
member of the family can enjoy



# aspire

SEE YOURSELF HERE







SEE YOURSELF HERE

aspire.tv



ASPiREtv

tvASPiRE

## WHY CHOOSE ASPIRE?

ASPiRE is the TV entertainment destination for affinity connections to culture and community.

### ORIGINAL PROGRAMMING



Earvin "Magic" Johnson sits down with America's most prominent influencers and has an intimate dialogue about their journey to success.

## BAMA STATE STYLE

A smart, cutting edge show that combines high-energy stand-up with off-the-cuff sketch comedy, hosted by rising stand-up comic, Robert Powell III.



Hosted by hip-hop artist, producer David Banner, ASPiRE's popular and first original series presents the best independent short films and documentaries from emerging African-American filmmakers.



A stylish, amusing culinary lifestyle series where YouTube sensations and friendly foodies, Seth Brundle and Leslie Robinson demonstrate how to turn everyday ingredients into extraordinary meals.



ASPiRE celebrates the best in independent music! Themed half-hour specials and short-form vignettes showcase acoustic performances from a variety of independent artists.



ASPiRE is an exclusive cable home for select LIVE football and basketball games that showcase HBCU's competitive spirit.

### WEB SERIES

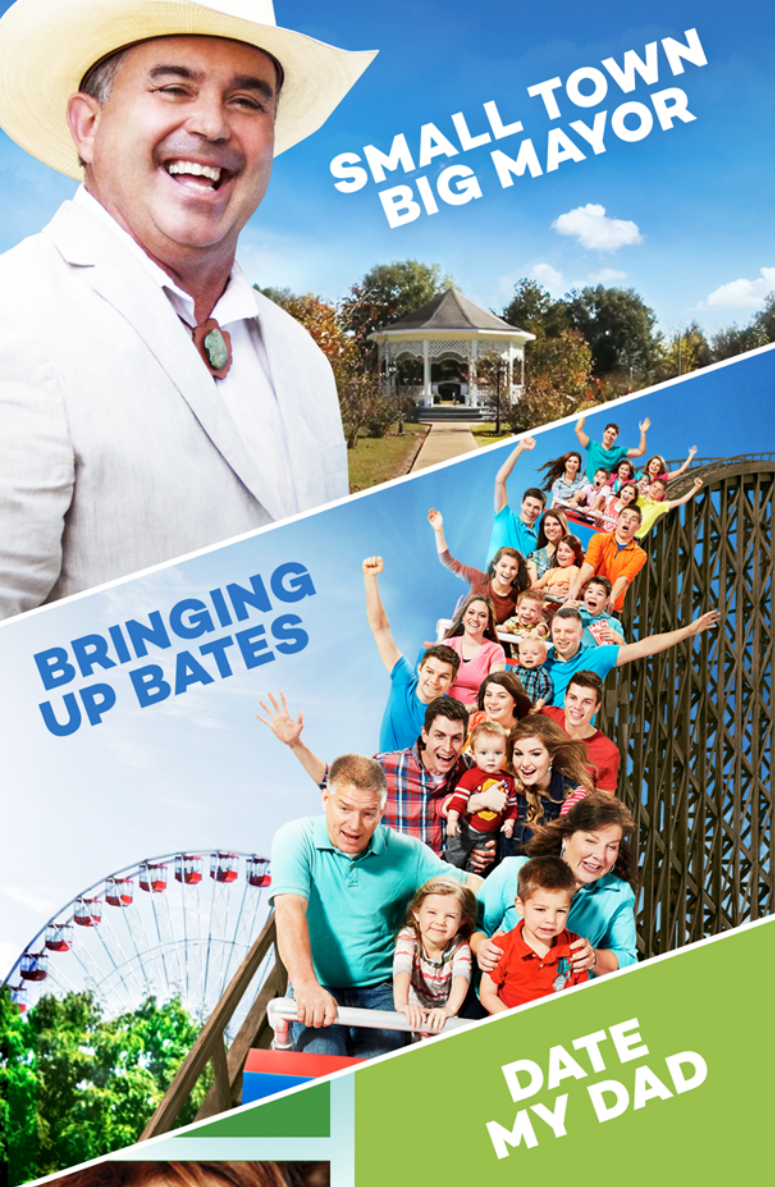


A raw and relatable comedy web series that reveals what parenting is *really* like from a mom's point of view.



A docu-web series that follows a group of fearless HBCU graduates trying to make it big in The Big Apple.

## **Exhibit B**



SMALL TOWN  
BIG MAYOR

BRINGING  
UP BATES

DATE  
MY DAD

GROWING UP MCGHEE



## We Get Family

At UP, we get family and the relationships that define them. We celebrate what makes each story **unique** and the **shared experiences** that brings us all together.

As TV's trusted home for families targeting adults, we promise to tell their stories in a way that is relatable, genuine, positive, but most of all **fun and entertaining**.

UP offers original scripted and reality series specials and original movies as well as fan favorite dramas and comedies filled with **uplifting stories of family**.

**THE**  
**TRUSTED BRAND**  
FOR STORIES  
ABOUT **FAMILY**





# GETTING YOUNGER & MORE UPSCALE

3 CONSECUTIVE QUARTERS OF YEAR OVER YEAR GROWTH

— Nielsen

## BRINGING UP BATES SEASON 4 IS A TOP 20 SHOW

— Nielsen



# WE GET CHRISTMAS

**2015 STRONGEST ORIGINAL PREMIERES EVER**

— Nielsen

**10 PREMIERE HOLIDAY MOVIES & SPECIALS IN 2016**

## CHRISTMAS 2016



**THE ROOFTOP  
CHRISTMAS TREE**



**MERRY  
CHRISTMAS,  
BABY!**



**SEASON'S  
GREETINGS**

## COMING in 2017



**DATE MY DAD (WT)**

Widower and former pro baseball player Ricky Cooper (Barry Watson) gets back in the dating game with the help of his three daughters and his mother in law (Raquel Welch), whether he likes it or not.

**SMALL TOWN BIG MAYOR**

Mayor John Henry Berry campaigned on the promise that he would restore D'Lo, MS (Pop 456) to its former glory and he has the 95 point plan to do it!



**HIGH-RISE RESCUE**

After a huge explosion in a high-rise she designed, Beth Davis (Catherine Bell), stops at nothing to save her family on the 55th floor.



AVAILABLE ON DIRECTV, DISH, XFINITY, CHARTER SPECTRUM, COX, OPTIMUM TV, VERIZON FIOS, AT&T U-VERSE CHECK LOCAL LISTINGS  
For detailed sourcing go to [UPtv.com/research](http://UPtv.com/research)

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